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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DISTRICT**

**DAVID HOUGH;
MOULOUD HOCINE;
JENNIFER LEHMKUHL HILL;
AMUND THOMPSON;
PAUL PANICO**

Plaintiffs,

v.

**RYAN CARROLL; MAX K. DAY;
MAX O. DAY; MICHAEL DAY;
YAX ECOMMERCE LLC; PRECISION
TRADING GROUP, LLC;
WA DISTRIBUTION LLC;
PROVIDENCE OAK PROPERTIES, LLC;
WA AMAZON SELLER LLC;
MKD INVESTMENT ADVISOR, LLC;
MKD FAMILY BENEFICIARY, LLC;
MKD FAMILY PRIVATE MANAGEMENT
COMPANY, LLC;
MAX DAY CONSULTING, LLC;
HOUTEX FARM EQUITY PARTNERS
LLC; BUSINESS FINANCIAL SOLUTIONS
ADVISORY LLC; EVO MAXX LLC;
YAX IP AND MANAGEMENT INC. (D.B.A.
“FULFILLABLE”); WWKB LLC;
DREAMS TO REALITY LLC;**

Defendants.

Case No.: 2:24-cv-02886-WLH

Assigned for all purposes to:
JUDGE WESLEY L. HSU

**DEFENDANTS RYAN CARROLL; MAX
K. DAY; MAX O. DAY; MICHAEL DAY;
YAX ECOMMERCE LLC; PRECISION
TRADING GROUP, LLC; WA
DISTRIBUTION LLC; PROVIDENCE
OAK PROPERTIES, LLC; WA AMAZON
SELLER LLC; MKD INVESTMENT
ADVISOR, LLC; MKD FAMILY
BENEFICIARY, LLC; MKD FAMILY
PRIVATE MANAGEMENT COMPANY,
LLC; MAX DAY CONSULTING, LLC;
HOUTEX FARM EQUITY PARTNERS
LLC; BUSINESS FINANCIAL
SOLUTIONS ADVISORY LLC; EVO
MAXX LLC; YAX IP AND
MANAGEMENT INC. (D.B.A.
“FULFILLABLE”); WWKB LLC; AND
DREAMS TO REALITY LLC’S MOTION
TO DISMISS**

Action Filed: April 9, 2024
Hearing: June 7, 2024, 1:30 p.m. PT
Trial Date: N/A

1 **TO THE COURT, ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

2 **PLEASE TAKE NOTICE** that on June 7, 2024, at 1:30 p.m. or as soon thereafter as this
3 matter may be heard before Judge Wesley L. Hsu in the above-entitled Court, located at 350 W.
4 1ST Street, Los Angeles, CA 90012, Defendants Ryan Carroll; Max K. Day; Max O. Day; Michael
5 Day; Yax Ecommerce LLC; Precision Trading Group, LLC; WA Distribution LLC; Providence
6 Oak Properties, LLC; WA Amazon Seller LLC; MKD Investment Advisor, LLC; MKD Family
7 Beneficiary, LLC; MKD Family Private Management Company, LLC; Max Day Consulting,
8 LLC; Houtex Farm Equity Partners LLC; Business Financial Solutions Advisory LLC; Evo Maxx
9 LLC; Yax IP and Management Inc. d/b/a "Fulfillable"; WWKB LLC; and Dreams To Reality
10 LLC's ("**Defendants**") will and hereby do move this Court for (1) An Order dismissing Plaintiffs
11 David Hough, Mouloud Hocine, Jennifer Lehmkuhl Hill, Amund Thompson, and Paul Panico's
12 ("**Plaintiffs**") claims for conspiracy to commit fraud, conspiracy to make fraudulent transfers,
13 conspiracy to violate CAL. BUS. & PROF. CODE § 17200 and §17500, and violations of securities
14 laws pursuant to 15 U.S.C. § 771 against all Defendants pursuant to Federal Rule of Civil
15 Procedure 12(b)(2) and Federal Rule of Civil Procedure 12(b)(6).
16
17

18 This Motion is made on the grounds that this Court lacks personal jurisdiction over the
19 Defendants and Plaintiffs have failed to state a claim upon which relief may be granted for each of
20 their causes of action against Defendants.
21

22 Dated: April 30, 2024.
23 Avon, CT

Respectfully submitted,

24 By: /s/ Rachel M. Crockett
Rachel M. Crockett
25 Attorney-in-Charge
26
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1 COME NOW SPECIALLY APPEARING DEFENDANTS RYAN CARROLL; MAX
2 K. DAY; MAX O. DAY; MICHAEL DAY; YAX ECOMMERCE LLC; PRECISION
3 TRADING GROUP, LLC; WA DISTRIBUTION LLC; PROVIDENCE OAK
4 PROPERTIES, LLC; WA AMAZON SELLER LLC; MKD INVESTMENT ADVISOR,
5 LLC; MKD FAMILY BENEFICIARY, LLC; MKD FAMILY PRIVATE MANAGEMENT
6 COMPANY, LLC; MAX DAY CONSULTING, LLC; HOUTEX FARM EQUITY
7 PARTNERS LLC; BUSINESS FINANCIAL SOLUTIONS ADVISORY LLC; EVO MAXX
8 LLC; YAX IP AND MANAGEMENT INC. (D.B.A. "FULFILLABLE"); WWKB LLC;
9 DREAMS TO REALITY LLC ("Defendants"), and hereby files *Defendants' Motion to*
10 *Dismiss* ("Motion") pursuant to Rule 12(b)(2) and Rule 12(b)(6) and respectfully shows the
11 Court as follows:
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14 MEMORANDUM OF POINTS AND AUTHORITIES

15 I. FACTUAL AND PROCEDURAL BACKGROUND

16 1. On April 9, 2024, Plaintiffs filed their original Complaint against Defendants asserting
17 causes of action for conspiracy to commit fraud, fraudulent transfers, conspiracy to violate
18 California Business and Professions Code §17200, and violations of securities laws, despite the
19 fact that they each have valid written contracts that prohibit such claims. *See* Dkt. 1.

20 2. On April 9, 2024, Plaintiffs also filed an *Ex Parte* Application for a Temporary Restraining
21 Order and an Order to Show Cause regarding a Preliminary Injunction ("Application"), seeking
22 the extraordinary remedy of a freeze of all of the Defendants' assets pre-judgment as well as a
23 disclosure of all their financial information pre-judgment. *See* Dkt. 9.

24 3. On April 11, 2024, Defendants filed an Opposition to Plaintiffs' Application
25 ("Opposition") on the grounds that (a) this Court lacked personal jurisdiction over the
26 Defendants; (b) the case should be compelled to binding arbitration pursuant to the Plaintiffs'
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1 written contracts; (c) Plaintiffs failed to establish a likelihood of success on the merits on any of
2 their claims; (d) Plaintiffs' evidence of alleged representations outside the written contracts
3 constituted inadmissible parol evidence; and other factors. *See* Dkt. 13.

4 4. On April 12, 2024, Plaintiffs filed a Reply to Defendants' Opposition to Plaintiffs'
5 Application. *See* Dkt. 15.

6 5. On April 15, 2024, this Court issued a Temporary Restraining Order ("**TRO**"), which held
7 that the Court did not have personal jurisdiction over any of the Defendants apart from the
8 Defendants Ryan Carroll; Max O. Day; Max K. Day; Michael Day; Yax Ecommerce LLC; WA
9 Distribution LLC; and Precision Trading Group, LLC (the "**Jurisdictional Defendants**") based
10 upon the facts available to the Court at the present time. *See* Dkt. 17.

11 6. On April 26, 2024, the Jurisdictional Defendants submitted their Supplemental Brief in
12 Opposition to Plaintiffs' Application ("**Supplemental Brief**") in accordance with the Court's
13 Minute Order. *See* Dkt. 31.

14 7. On April 28, 2024, the Jurisdictional Defendants filed a Motion to Compel Arbitration and
15 a Motion to Stay. *See* Dkt. 34. For purposes of judicial efficiency, the Jurisdictional Defendants
16 hereby incorporate by reference the arguments previously made in their previously filed
17 Opposition (Dkt. 13), their Supplemental Brief (Dkt. 31), and their Motion to Compel Arbitration
18 (Dkt. 34) and will not be restating all of the arguments in their Opposition and Supplemental Brief
19 here.

20 8. As set forth in Defendants' Opposition and the Jurisdictional Defendants' Motion to
21 Compel Arbitration, this Court lacks personal jurisdiction over the Defendants and Plaintiffs have
22 failed to state a claim upon which relief may be granted on any of their causes of action. Thus,
23 Defendants hereby file their Motion to Dismiss under Rule 12(b)(2) for lack of personal
24 jurisdiction and Rule 12(b)(6) for failure to state a claim.

II. ARGUMENT AND AUTHORITIES

A. Legal Standard for a Rule 12(b)(2) Motion to Dismiss

9. Federal Rule of Civil Procedure 12(b)(2) permits a defendant to file a motion to dismiss based upon a lack of personal jurisdiction. “In opposing a defendant's motion to dismiss for lack of personal jurisdiction, the plaintiff bears the burden of establishing that jurisdiction is proper.” *Ranza v. Nike, Inc.*, 793 F.3d 1059, 1068 (9th Cir. 2015) (citation omitted). A plaintiff may not simply rest on the “bare allegations of [the] complaint.” *Id.* (citations omitted).

10. “Federal courts ordinarily follow state law in determining the bounds of their jurisdiction over [defendants].” *Daimler AG v. Bauman*, 571 U.S. 117, 125 (2014) (citing FED.R.CIV.P. 4(k)(1)(A)). Personal jurisdiction in federal court is governed by the law of the state in which the federal court sits. *Walden v. Fiore*, 571 U.S. 277, 283 (2014) (citations omitted).

11. A California court may exercise personal jurisdiction over a nonresident defendant to the extent allowed under the state and federal Constitutions. *See* CODE CIV. PROC., § 410.10. “Because California's long-arm jurisdictional statute is coextensive with federal due process requirements, the jurisdictional analyses under California state law and federal due process are the same. *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800 (9th Cir. 2004) (citation omitted); *Accord Daimler*, 571 U.S. at 125.

12. The exercise of personal jurisdiction is constitutionally permissible only if the defendant has sufficient “minimum contacts” with the forum state so that the exercise of jurisdiction “does not offend ‘traditional notions of fair play and substantial justice.’ ” *International Shoe Co. v. Washington*, (1945) 326 U.S. 310, 316. “Each defendant's contacts with the forum State must be assessed individually.” *Calder v. Jones*, (1984) 465 U.S. 783, 788.

13. A defendant that has substantial, continuous, and systematic contacts with the forum state is subject to general jurisdiction. *Perkins v. Benguet Mining Co.*, (1952) 342 U.S. 437, 445–446.

1 Absent such extensive contacts, a defendant may only be subject to specific jurisdiction.
2 *Helicopteros Nacionales de Colombia v. Hall*, (1984) 466 U.S. 408, 414, fn. 8. Specific
3 jurisdiction “depends on the quality and nature of the defendant's forum contacts in relation to the
4 particular cause of action alleged.” *HealthMarkets, Inc. v. Superior Court*, 171 Cal. App. 4th
5 1160, 1167 (2009).

6
7 14. A nonresident defendant is subject to specific jurisdiction only if “(1) the defendant
8 purposefully availed itself of the benefits of conducting activities in the forum state; (2) the
9 controversy arises out of or is related to the defendant's forum contacts; and (3) the exercise of
10 jurisdiction would be fair and reasonable.” *Id.* (Citing *Burger King Corp. v. Rudzewicz*, (1985)
11 471 U.S. 462, 472, 475-478).

12 **B. This Court Lacks Personal Jurisdiction Over the Defendants, Particularly All**
13 **Defendants Apart from Wealth Assistants**

14 15. Plaintiffs have “the initial burden to demonstrate facts establishing a basis for personal
15 jurisdiction.” *HealthMarkets*, 171 Cal. App. 4th at 1167. Plaintiffs’ bare bones allegations that
16 Defendant Yax Ecommerce, LLC, f/k/a Wealth Assistants, LLC (“**Wealth Assistants**”) marketed
17 its services throughout the United States and that it entered into business contracts with a couple
18 of California residents is certainly insufficient to establish the high burden of general jurisdiction
19 over a nonresident. Plaintiffs’ cursory jurisdictional allegations are also woefully insufficient to
20 subject any of the Defendants to specific jurisdiction.

21
22 16. “The purposeful availment inquiry ... focuses on the defendant's intentionality.”
23 *HealthMarkets*, 171 Cal. App. 4th at 1168 (citations omitted). “This prong is only satisfied when
24 the defendant purposefully and voluntarily directs his activities toward the forum so that he should
25 expect, by virtue of the benefit he receives, to be subject to the court's jurisdiction based on his
26 contacts with the forum.” *Pavlovich v. Superior Court*, (2002) 29 Cal. 4th 262, 269.

1 17. A few contracts with California residents is insufficient to establish purposeful availment,
2 even for Wealth Assistants, let alone the other entity and individual defendants who were not a
3 party to these contracts. *See Goehring v. Superior Court*, (1998) 62 Cal. App. 4th 894, 907
4 (finding no purposeful availment based solely on the defendants' execution of "sales, security and
5 escrow agreements" with a forum resident); *Doe v. Unocal Corp.*, (9th Cir. 2001) 248 F.3d 915,
6 924 (finding no purposeful availment based solely on the defendant's contractual relations with a
7 forum resident); *McGlinchy v. Shell Chemical Co.*, (9th Cir. 1988) 845 F.2d 802, 816 (same).

9 a. The Court Lacks Personal Jurisdiction over the other Entity Defendants.

10 18. With respect to the other entity Defendants, Plaintiffs have merely alleged that one or more
11 directors or owners are common. However, the fact that "directors and officers were interlocking
12 is insufficient to rebut the presumption that each common officer or director wore the appropriate
13 'hat' when making corporate and operational decisions for the respective entities," and does not
14 provide basis for exercise of personal jurisdiction over a nonresident corporation, even in a state
15 where an affiliate or subsidiary engaged in business. *Sonora Diamond Corp. v. Superior Court*, 83
16 Cal. App. 4th 523, 549 (2000) (*Citing Lowell Staats Mining Co., Inc. v. Pioneer Uravan Inc.*,
17 (10th Cir. 1989) 878 F.2d 1259, 1262).

19 19. Similarly, "the mere fact that an officer of the foreign corporation also exercised director
20 duties in-forum" is insufficient to establish personal jurisdiction over that director or officer.
21 *Rivelli v. Hemm*, 67 Cal. App. 5th 380, 396 (2021) (*Citing Sonora Diamond*, 83 Cal.App.4th at
22 549, 552). "Personal jurisdiction must be based on forum-related acts that were personally
23 committed by each nonresident defendant." *Id.* (*Quoting In re Automobile Antitrust Cases I & II*,
24 (2005) 135 Cal. App.4th 100, 113). "Allegations of conspiracy [also] do not establish as a matter
25 of law that if one conspirator comes within the personal jurisdiction of our courts, then California
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1 may exercise jurisdiction over other nonresident defendants who are alleged to be part of that
2 same conspiracy.” *In re Automobile Antitrust*, 135 Cal. App.4th at 113.

3 20. In fact, this Court has already ruled that it does not have personal jurisdiction over all entity
4 Defendants, apart from the specified Jurisdictional Defendants (the “**Non-Jurisdictional**
5 **Defendants**”) based upon the facts and evidence thus far presented by Plaintiffs. *See* Dkt. 17.

6 21. Accordingly, California does not have personal jurisdiction over any of the other entity
7 Defendants, even if it possesses personal jurisdiction over Wealth Assistants.
8

9 b. This Court lacks Personal Jurisdiction over Defendant Max O. Day.

10 22. As set forth in the Declaration of Max O. Day, he only ever served as an independent
11 contractor to Wealth Assistants.¹ He was not an employee, owner, manager or stakeholder. *Id.* He
12 never had any access to any company funds, financial records, bank accounts, or other assets,
13 beyond the occasional performance report provided by the owners and managers of Wealth
14 Assistants. *Id.* at ¶6. Plaintiffs’ counsel, Nico Banks’ (“**Mr. Banks**”), relentless pursuit of Max O.
15 Day in this litigation and other proceedings is a case of assumed malfeasance based upon a shared
16 name. *Id.* at ¶9. Mr. Banks assumes, without any factual basis, that because Max O. Day happens
17 to share a name with Max K. Day, he must also have been an owner or manager of Wealth
18 Assistants, and thus a participant in the alleged (but unsubstantiated) fraud. The TRO was
19 erroneously issued against Max O. Day on the basis of Mr. Banks’ false assertions of “fact”
20 against Max O. Day.
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23 23. In reality, Max O. Day is presently owed a substantial sum of money from Wealth
24 Assistants. *See* Ex. A, Max O. Day Decl. at ¶8. This Court also lacks personal jurisdiction over
25 Max O. Day as he was not an owner or manager of Wealth Assistants and had no dealings with
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28 ¹ *See* **Exhibit A**, Declaration of Max O. Day at ¶5.

1 California or its residents such that he should have expected to be hauled into Court in this forum.
2 *Id.* at ¶5; *Burger King*, (1985) 471 U.S. at 472, 475-478.

3 24. This litigation and the resultant TRO has caused significant financial strain to Max O. Day
4 and his family. *See* Ex. A, Max O. Day Decl. at ¶9. It has also damaged his personal and
5 professional reputation by falsely associating him with allegations of fraud, without any factual
6 basis. *Id.* Thus, this Court must dismiss Max O. Day from this litigation as it lacks personal
7 jurisdiction over him.
8

9 c. This Court lacks Personal Jurisdiction over the Remaining Individual Defendants.

10 25. When a plaintiff is seeking to acquire jurisdiction over an officer of a corporation on an
11 individual basis, “there must be a reason for the court to disregard the corporate form.” *Davis v.*
12 *Metro Prods.*, 885 F.2d 515, 520 (9th Cir.1988). “Under the fiduciary shield doctrine, a person's
13 mere association with a corporation that causes injury in the forum state is not sufficient in itself
14 to permit that forum to assert jurisdiction over the person.” *Id.*
15

16 26. For jurisdictional purposes, “the acts of corporate officers and directors in their official
17 capacities are the acts of the corporation *exclusively* and are thus *not material* for purposes of
18 establishing minimum contacts as to the individuals.” *Colt Studio, Inc. v. Badpuppy Enter.*, 75 F.
19 Supp. 2d 1104, 1111 (C.D. Cal. 1999) (emphasis added); (*Citing Shearer v. Superior Court*, 70
20 Cal.App.3d 424, 430 (1977)). “Implicit in this principle is the consideration that corporations are
21 separate legal entities that cannot act on their own but must do so through their appointed
22 representatives.” *Id.* (*Citing Mihlon v. Superior Court*, 169 Cal.App.3d 703, 713 (1985)).
23 Accordingly, “acts performed by these individuals, in their official capacities, cannot reasonably
24 be attributed to them as individual acts creating personal jurisdiction.” *Id.*
25

26 27. As admitted by Plaintiffs, none of the individual Defendants live in California and they are
27 being sued solely due to their status as member of the various LLCs that Plaintiffs have sued. *See*
28

1 Dkt. 1 at ¶¶20-37. All of the alleged representations made by the individual Defendants occurred
2 in their official capacity as members of Wealth Assistants. *Id.* at ¶¶75-76, 85, 89-92. Even taking
3 the allegations of Plaintiffs' Complaint as true, it is clear that the individual Defendants' alleged
4 representations about the potential financial performance of an Amazon Storefront pursuant to a
5 contract for services with Wealth Assistants were made by and on behalf of Wealth Assistants.
6 Furthermore, Plaintiffs cannot rest upon the laurels of the conclusory allegations in their
7 Complaint. *Ranza*, 793 F.3d at 1068.

9 28. Plaintiffs also make allegations regarding alleged fraudulent transfers to certain individual
10 Defendants; however, there is zero evidence that any transfer was ever made to a single individual
11 Defendant, let alone a fraudulent transfer. *See* Dkt. 1 at ¶¶83-84, 89, 104, 108. These allegations
12 are mere speculation by Plaintiffs and their counsel. Thus, on a Rule 12(b)(2) Motion to Dismiss,
13 Plaintiffs cannot meet their burden of establishing personal jurisdiction over the individual
14 Defendants based on such conclusory allegations.

16 29. Plaintiffs have also alleged in recent filings that they intend to pursue certain alter-ego
17 theories. However, such theories are glaringly absent from their Complaint. *See* Dkt. 1.
18 Nevertheless, Plaintiffs cannot establish an alter-ego theory to confer personal jurisdiction over
19 the non-Wealth Assistants Defendants either. In order to prevail on an alter ego theory, plaintiff
20 must make a prima facie case "(1) that there is such unity of interest and ownership that the
21 separate personalities of [the entities] no longer exist and (2) that failure to disregard [their
22 separate identities] would result in fraud or injustice." *Colt Studio*, 75 F. Supp. 2d at 1111
23 (*Quoting Flynt Distrib. Co., Inc. v. Harvey*, 734 F.2d 1389, 1393 (9th Cir.1984)).

25 30. Plaintiffs cannot establish that such a unity of interest exists such that the personality of
26 Wealth Assistants no longer exists. Similar to the allegations in *Colt Studio*, Plaintiffs' conclusory
27 allegations that the individual Defendants were behind the actions of Wealth Assistants or were
28

1 acting in concert with the entity Defendants is insufficient. *Colt Studio*, 75 F. Supp. 2d at 1111.
2 Plaintiffs also cannot establish that a fraud or injustice would result if the separate identity of the
3 LLC was not disregarded. Plaintiffs essentially contend that they may not be able to collect a
4 monetary judgment against Wealth Assistants. However, “California courts have held that the
5 difficulty in collecting a judgment, as from an undercapitalized subsidiary, does not fulfill the
6 requirement of injustice. *Pac. Mar. Freight, Inc. v. Foster*, No. 10-CV-0578-BTM-BLM, 2010
7 WL 3339432, at *7 (S.D. Cal. Aug. 24, 2010) (Citing *Virtualmagic Asia, Inc. v. Fil-Cartoons,*
8 *Inc.*, 99 Cal.App.4th 228, 245 (2002)). Thus, Plaintiffs cannot prove the second element of an
9 alter-ego theory either. Rather, Plaintiffs “must rely solely on the minimum contacts doctrine to
10 establish personal jurisdiction over the ... individual defendants,” which they admittedly cannot
11 establish and they make no allegations to support such a claim. *Colt Studio*, 75 F. Supp. 2d at
12 1111.
13
14

15 31. Accordingly, this Court should grant Defendant’s Rule 12(b)(2) Motion to Dismiss for lack
16 of personal jurisdiction.

17 **C. Legal Standard for a Rule 12(b)(6) Motion to Dismiss.**

18 32. Rule 12(b)(6) authorizes dismissal for “failure to state a claim upon which relief can be
19 granted” when a complaint does not meet the pleading requirements of Rule 8. FED. R. CIV. P.
20 12(b)(6). As discussed more thoroughly in Defendant’s Opposition and the Jurisdictional
21 Defendant’s Motion to Compel Arbitration, which are hereby incorporated by this reference,
22 Texas and Florida law should apply to Plaintiffs’ claims pursuant to the choice of law provisions
23 in their written contracts.²
24
25
26

27 ² See Dkt. 13 at p. 13, fn. 3; Dkt. 34 at p. 7; See Ex. A. to Decl. Day (Dkt. 34-2) at p. 7, Texas law; Ex. B. to Decl. Day
28 (Dkt. 34-3) at p. 7, Texas law; Ex. C. to Decl. Day (Dkt. 34-4) at p. 7, Texas law; Ex. D. to Decl. Day (Dkt. 34-5) at p.
7, Texas law; Ex. E to Decl. Day (Dkt. 34-6) at p. 6, 10, Florida law.

1 33. First, a court “considering a motion to dismiss may begin by identifying allegations that,
2 because they are mere conclusions, are not entitled to the assumption of truth.” *Ashcroft v. Iqbal*,
3 556 U.S. 662, 664 (2009). Then, when reviewing the sufficiency of a complaint, the court must
4 “determine whether the plaintiff has stated a legally cognizable claim that is plausible ...” *Lone*
5 *Star Fund V (U.S.), L.P. v. Barclays Banks PLC*, 594 F. 3d 383, 387 (5th Cir. 2010) (citation
6 omitted). This “plausibility standard is not akin to a ‘probability requirement,’ but it asks for
7 more than a sheer possibility that a defendant has acted unlawfully.” *Ashcroft*, 556 U.S. at 678
8 (citation omitted). The plaintiff must “plead[] factual content that allows the court to draw the
9 reasonable inference that the defendant is liable for the misconduct alleged.” *Id.*

11 34. Where a complaint pleads facts that are ‘merely consistent with’ a defendant’s liability,” it
12 fails to meet the plausibility test. *Ashcroft*, 556 U.S. at 678. While a court must accept well-plead
13 factual allegations in the complaint as true, a court need not defer to legal conclusions that a
14 complaint couches as facts. “Rule 8 ... does not unlock the doors of discovery for a plaintiff
15 armed with nothing more than conclusions. *Id.* at 678-79. “Plaintiff’s obligation to provide the
16 grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic
17 recitation of the elements of a cause of action will not do.” *Bell Atlantic Corp. v. Twombly*, 550
18 U.S. 544, 555 (2007) (internal quotation marks, brackets, and citation omitted). Nor does a
19 complaint suffice if it tenders “naked assertion[s]” devoid of “further factual enhancement.” *Id.* at
20 557.

23 **D. Plaintiffs Have Failed to State a Claim Upon Which Relief Can be Granted for Each**
24 **of the Defendants, Particularly the Non-Wealth Assistants Defendants**

25 35. With respect to all Defendants apart from Wealth Assistants and the individual defendants,
26 (the “**Additional Defendants**”) Plaintiffs’ Complaint and *Ex Parte* Application is completely
27 devoid of any specific factual allegations of wrongdoing by said Additional Defendants. The
28 allegations with respect to the Additional Defendants consist solely of the fact that one Defendant

1 Max K. Day bears some relationship to the other entities (whether it be by virtue of some level of
2 ownership, management, a simple shared address for service of process, or even just a similar
3 sounding name or initials). *See* Dkt. 9 at pp. 13-15. This is woefully insufficient to prove a
4 likelihood of success on the merits on any of Plaintiffs' causes of action against these Additional
5 Defendants. Plaintiffs have not alleged a single fact with respect to any action or inaction taken by
6 the Additional Defendants. *Id.*

8 36. As Plaintiffs indisputably have no specific allegations regarding any alleged misconduct of
9 the Additional Defendants, Plaintiffs' Complaint against the Additional Defendants must be
10 dismissed even if they are even partially successful as to Wealth Assistants.

11 **E. Plaintiffs Failed to State a Claim for Their Fraud Cause of Action**

12 37. Plaintiffs' primary cause of action against Defendants is fraud, yet they fail to identify a
13 single misrepresentation of material fact.

15 38. "[W]hile a federal court will examine state law to determine whether the elements of fraud
16 have been pled sufficiently to state a cause of action, the Rule 9(b) requirement that the
17 circumstances of the fraud must be stated with particularity is a federally imposed rule." *Kearns*
18 *v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2009). To satisfy Rule 9(b), a pleading must
19 identify "the who, what, when, where, and how of the misconduct charged," as well as "what is
20 false or misleading about [the purportedly fraudulent] statement, and why it is false." *Cafasso*,
21 *U.S. ex rel. v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1055 (9th Cir. 2011)

23 39. Such details are glaringly absent from Plaintiffs' Complaint. Plaintiffs did not plead their
24 fraud claim with specificity, including what statements were made, when they were made, by
25 whom they were made, to whom they were made, and by what means they were made.

26 40. Plaintiffs' allegations boil down to the fact that their businesses were unsuccessful, which is
27 a known inherent risk of any entrepreneurial enterprise. The only alleged "misrepresentations" are
28

1 that Wealth Assistants advertised that the profits of an online store it managed **should grow** to
2 more than \$10,000 per month by the end of the store's first year. *See* Dkt. 1 at ¶6. It is clear under
3 Texas law that the profit projections in Wealth Assistant's advertising were mere puffery, not
4 actionable fraud. *Southland Sec. Corp. v. INSpire Ins. Sols., Inc.*, 365 F.3d 353 (5th Cir. 2004)
5 (predictions of future earnings and revenues were puffery, not actionable)³. The slide deck and
6 other advertising contained express warnings that the income projections were just that,
7 projections, not guarantees of success. An assertion that a store may achieve \$10,000 in profits
8 within 12-18 months of operations, is not an unconditional guarantee of an exact dollar amount of
9 income. The slide deck contained within Plaintiffs' Complaint also contains explicit warnings that
10 any income projections are theoretical and not to be relied upon. *See* Dkt. 1 at p. 14. Specifically,
11 it states multiple times on multiple pages that:
12

13
14 The images and sales summary are not actual and are used for
15 illustrative purposes only ... No client's success, earnings, or
16 production results should be viewed as typical, average, or expected.
17 Not all clients achieve the same or similar results due to many factors,
18 including, but not limited to, the amount of inventory purchase per
month to be sold on your store, margins of products to be sold, and
your results may be higher, or lower than stated.
an stated.

19 *Id.* Plaintiffs written contracts also warned that "[t]he Service Provider is not liable for any
20 specific outcomes and makes no claims about the amount of success the Client will achieve.
21 Results may vary depending on many factors, such as market trends, conditions and third-party
22 algorithms over which the Service Provider has not influence." *See* Ex. A to Dkt. 1 a p. 2. "The
23 essence of fraud is that its perpetrator has persuaded his victim to believe, **beyond the dictates of**
24

25
26
27 ³ Many of Plaintiffs' contracts have choice of law provisions, which hold that Texas law applies; hence the discussion
28 of Texas law, however California law also holds that mere puffery is not actionable fraud. *See e.g. In re Impac Mortg.*
Holdings, Inc. Sec. Litig., 554 F. Supp. 2d 1083, 1096 (C.D. Cal. 2008).

1 *reason or prudence*, what is not so.” *United States v. Greenlaw*, 84 F.4th 325, 339 (5th Cir. 2023)
2 (emphasis added).

3 41. “It is well settled that representations as to future earnings or profits are mere opinion, and
4 cannot be treated as fraud.” *Sommer v. Martinair, Inc.*, 1993 WL 385443 at *5 (Tex.App.-
5 Dallas); *See also Zar v. Omni Indus., Inc.*, 813 F.2d 689, 693 (5th Cir. 1987)(“[t]he generally
6 accepted rule in Texas jurisprudence is that future predictions and opinions, especially those
7 regarding the future profitability of a business, cannot form a basis for fraud as a matter of law.”).

8 As stated in *Lloyd v. Junkin*:

9
10 In order to effect a sale, induce the making of a contract, or place a
11 proposed investment in a favorable light, it is quite common to make
12 representations as to future value, productiveness, efficiency, or
13 economy, or as to expected earnings or profits. But since that which
14 lies in the future cannot be a matter of certain knowledge, it is held
15 that all such representations must be taken and understood as mere
16 expressions of opinion, and therefore their nonfulfillment cannot be
17 treated as fraud.

18 75 S.W.2d 712, 714 (Tex.Civ.App.—Dallas 1934, no writ). Thus, the alleged representations
19 regarding the potential profitability of an Amazon storefront cannot constitute actionable fraud.

20 42. Plaintiffs also have insufficiently pled the other elements of fraud (namely (2) knowledge
21 of falsity; (3) intent to induce reliance; (4) justifiable reliance; and (5) resulting damage). *Italian*
22 *Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am.*, 341 S.W.3d 323, 337 (Tex. 2011). Plaintiffs’
23 allegations that Defendants knew these statements regarding Wealth Assistant’s businesses being
24 profitable were false at the time they were made is a mere conclusory recitation of the element,
25 which is insufficient. In fact, Plaintiffs allege in their Complaint that Wealth Assistants did not
26 honor its alleged promises because it was going out of business and planned to “cease all
27 operations before December 1, 2023.” *See* Dkt. 1 at ¶79. If Wealth Assistants faced unanticipated
28 financial conditions and had to shut down its business as Plaintiffs allege, that would indicate that

1 Defendants in fact did not know that the prior alleged representations about Wealth Assistants
2 being profitable were false at the time they were made years prior.

3 43. Furthermore, Plaintiffs cannot establish justifiable reliance. If the parties' written agreement
4 directly contradicts a party's alleged belief, that party cannot show actual and justifiable reliance
5 as a matter of law. *Mercedes-Benz USA, LLC v. Carduco, Inc.*, 583 S.W.3d 553, 559 (Tex. 2019).
6 As the Texas Supreme Court explained, "a party to a written contract cannot justifiably rely on
7 oral misrepresentations regarding the contract's unambiguous terms." *Id.*; *See also Thigpen v.*
8 *Locke*, 363 S.W.2d 247, 251 (Tex. 1962) ("In an arm's-length transaction the defrauded party must
9 exercise ordinary care for the protection of his own interests.... [A] failure to exercise reasonable
10 diligence is not excused by mere confidence in the honesty and integrity of the other party."). This
11 is particularly true when the party had a reasonable opportunity to review the written agreement
12 but failed to do so. *See Tex. & Pac. Ry. Co. v. Poe*, 115 S.W.2d 591, 592 (1938).

13
14
15 44. Here, Plaintiffs are limited to the terms of his written contracts. "There is no evidence of
16 active trickery or deceit in this record." *Thigpen*, 363 S.W.2d at 251.

17 45. Even if Plaintiffs' parol evidence were ultimately admissible, which it is not as discussed
18 *infra*, the express written terms of such evidence also contradict Plaintiffs' position as they
19 contained explicit warnings that they were merely indications of potential future profits, not
20 guarantees of the performance of any particular store. Thus, Plaintiffs cannot prove the element of
21 justifiable reliance and their fraud claims must be dismissed.

22
23 **F. Plaintiffs' Alleged Representations Outside of the Written Contract are Prohibited by**
24 **the Parol Evidence Rule**

25 46. As the majority of Plaintiffs' contracts mandate the application of Texas substantive law,
26 but some mandate the application of Florida substantive law, Defendants will discuss both Florida
27 and Texas law, although the law is substantially identical in both venues. "[I]t is a well settled
28 principle of contract law that where the terms of a contract are unambiguous, the parties' intent

1 must be determined from within the four corners of the document.” *Barakat v. Broward Cnty.*
2 *Hous. Auth.*, 771 So. 2d 1193, 1194 (Fla. Dist. Ct. App. 2000); *See also Posse Energy, Ltd. v.*
3 *Parsley Energy, LP*, 632 S.W.3d 677, 687 (Tex. App. 2021). “[A] court may not consider extrinsic
4 or parol evidence to change the plain meaning set forth in the contract.” *Spring Lake NC, LLC v.*
5 *Figueroa*, 104 So. 3d 1211, 1214 (Fla. Dist. Ct. App. 2012); *See also Anglo-Dutch Petroleum Int’l,*
6 *Inc. v. Greenberg Peden, P.C.*, 352 S.W.3d 445, 451 (Tex. 2011).

7
8 47. “It is never the role of a trial court to rewrite a contract to make it more reasonable for one
9 of the parties or to relieve a party from what turns out to be a bad bargain.” *Barakat*, 771 So. 2d at
10 1194. In the absence of ambiguity, “the language itself is the best evidence of the parties’ intent
11 and its plain meaning controls.” *Id.*; *See also First Bank v. Brumitt*, 519 S.W.3d 95 (Tex. 2017).

12 48. It is noteworthy that the parol evidence rule is not a rule of evidence, but a “fundamental
13 rule of substantive law,” making its discussion appropriate at this stage. *The Florida Bar v.*
14 *Frederick*, 756 So.2d 79, 85 n. 2 (Fla.2000); *See also Johnson v. Driver*, 198 S.W.3d 359, 364
15 (Tex. App.--Dallas 2006).

16
17 49. All of Plaintiffs’ alleged misrepresentations, apart from the written contracts, is
18 inadmissible parol evidence. The written contracts are not alleged to be ambiguous. Thus, in
19 interpreting and enforcing the written contracts, the Court is limited to the four-corners of the
20 agreement. *Spring Lake NC*, 104 So. 3d at 1214; *Anglo-Dutch*, 352 S.W.3d at 451.

21
22 **G. Plaintiffs Cannot Show a Likelihood of Success on Their Fraudulent Transfer Claim**

23 50. Both California and Texas have adopted the Uniform Fraudulent Transfer Act (“UFTA”).
24 The elements of a fraudulent transfer are: (1) a creditor; (2) a debtor; (3) the debtor transferred
25 assets shortly before or after the creditor’s claim arose; (4) with actual intent to hinder, delay, or
26 defraud any of the debtor’s creditors; (5) without receiving a reasonably equivalent value in
27 exchange. CAL. CIV. CODE § 3439.04(A); *See also* TEX. BUS. & COM. CODE § 24.005.
28

1 51. Plaintiffs merely make bare-bones conclusory allegations that Defendants have engage in
2 fraudulent transfers with no specific factual information. *See* Dkt. 1 at ¶¶83-84, 89, 104, 108.
3 There are no dates, amounts, or means specified. These allegations are mere speculation by
4 Plaintiffs and their counsel without the requisite specificity.

5 52. Furthermore, there are no allegations sufficient to support an actual intent to hinder, delay,
6 or defraud any alleged creditor. Nor is there anything apart from a conclusory statement to support
7 the allegation that Wealth Assistants did not receive reasonably equivalent value for any purported
8 transfer.

9 53. Thus, Plaintiffs' fraudulent transfer claim must also be dismissed.

10
11 **H. Plaintiffs Cannot Show a Likelihood of Success on Their Claim for Conspiracy to**
12 **Violate California's Unfair Competition Law**

13 54. Plaintiffs also cannot meet the elements of their claim for conspiracy to violate California's
14 Unfair Competition Law ("UCL"). CAL. BUS. & PROF. CODE §§ 17200 et seq.

15 55. The UCL defines "unfair competition" as, any "unlawful, unfair or fraudulent business
16 practice" *Id.* Unlawful business activity" proscribed under section 17200 includes "anything that
17 can properly be called a business practice and that at the same time is forbidden by law." *Farmers*
18 *Ins. Exch. v. Superior Court*, 2 Cal. 4th 377, 383 (1992) (citations omitted). "[I]n essence, an
19 action based on Business and Professions Code section 17200 to redress an unlawful business
20 practice 'borrows' violations of other laws." *Id.*

21
22 56. Plaintiffs have not identified or established a violation of any other federal or state law, that
23 could be "borrowed" to satisfy the elements of a UCL claim. All of the issues of which Plaintiffs'
24 complain are breach of contract issues: (1) Wealth Assistants did not set up certain online stores as
25 allegedly promised in the contracts; (2) Wealth Assistants did not provide certain inventory as
26 allegedly promised in the contracts; and (3) Wealth Assistants did not honor the buyback clause in
27 the contracts. *See* Dkt. 1 at ¶¶8-10, 42-51 In fact, in alleging the promises that Wealth Assistants
28

1 failed to deliver upon, Plaintiffs extensively reference the written contracts. *Id.* at ¶¶42-51, 59, 63,
2 67, 72, 76.

3 57. “A plaintiff may thus not ‘plead around’ an ‘absolute bar to relief’ simply ‘by recasting the
4 cause of action as one for unfair competition’.” *Zhang v. Superior Court*, 57 Cal. 4th 364, 377
5 (2013). All of Plaintiffs’ contracts with Wealth Assistants, which they tellingly never discuss,
6 have a strict limitation of liability clause, which provides that Wealth Assistants shall not be liable,
7 whether in tort or breach of contract, for any consequential damages, loss of business, diminution
8 in value, costs of replacement, etc. and that Plaintiffs are limited to a recovery of the amount of
9 fees they paid to Wealth Assistants in the prior 12 month period. *See* Ex. A. to Dkt. 1 at p. 6,
10 Clause 8. Plaintiffs seek to evade the limitation of liability clause, which was highlighted for them
11 in all capital letters, in the contracts they knowingly signed, by couching their claims under
12 various tort theories. *Id.* If plaintiffs were allowed to cast any breach of contract as a UCL claim, it
13 would eviscerate contract law in California, and the specifically negotiated for benefit of the
14 bargain.

15 58. Plaintiffs are unclear in their Complaint; however, to the extent they attempt to base their
16 UCL claim on a violation of California’s false advertising laws, to state a claim under the UCL
17 based on false advertising, it is necessary to show that “members of the public are likely to be
18 deceived.” *Committee on Children's Television, Inc. v. General Foods Corp.*, (1983) 35 Cal. 3d
19 197, 211. Unless the challenged conduct “targets a particular disadvantaged or vulnerable group, it
20 is judged by the effect it would have on a reasonable consumer.” *Lavie v. Procter & Gamble Co.*,
21 (2003) 105 Cal. App. 4th 496, 506–507.

22 59. As noted by the FTC many years ago: “Perhaps a few misguided souls believe, for
23 example, that all ‘Danish pastry’ is made in Denmark. Is it, therefore, an actionable deception to
24 advertise ‘Danish pastry’ when it is made in this country? Of course not. A representation does not
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1 become ‘false and deceptive’ merely because it will be unreasonably misunderstood by an
2 insignificant and unrepresentative segment of the class of persons to whom the representation is
3 addressed.” *Id.*

4 60. Wealth Assistants’ alleged slide decks, merely state that the goal is to obtain \$10,000 in
5 profits by months 9-12 of owning an Amazon store. *See* Dkt. 1 at p. 14. A reasonable consumer
6 would understand that the examples of profitable stores in Wealth Assistant’s alleged advertising,
7 were just that, examples of profitability that might be attained, not an absolute guarantee that any
8 certain number would be obtained by any certain date as specifically stated in said advertising. *Id.*

9 61. Thus, Plaintiffs’ UCL claim must also fail.

10
11 **I. Plaintiffs’ Claims for Violations of Securities Laws Must Also Fail**

12 62. Plaintiffs bring a cause of action for violation of 15 U.S.C. § 771 against all Defendants.
13 Section 771 creates a private cause of action for a plaintiff when a defendant sells the plaintiff
14 unregistered securities, or sells the plaintiff securities by means of an untrue statement of material
15 fact. *See* 15 U.S.C. § 771. The only definition of an unregistered security that could possibly
16 apply is an “investment contract.” *See* 15 U.S.C. §77b.

17
18 63. In order to constitute an investment contract, three elements must be satisfied: (1) it “must
19 involve an investment of money;” (2) “the money must have been invested in a common
20 enterprise;” and (3) “the anticipated profit must come solely from the efforts of others.” *S.E.C. v.*
21 *Goldfield Deep Mines Co. of Nevada*, 758 F.2d 459, 463 (9th Cir. 1985). Here, Plaintiffs cannot
22 prove either the second or third element. There are no allegations to support a notion that the
23 Plaintiffs’ money was invested in a common enterprise. Rather, the allegations and contracts
24 evidence that each Plaintiff was supplied with an individual storefront, whose profits belong
25 solely to each individual Plaintiff. *See* Dkt. 1 at ¶¶58, 62, 66-78. Plaintiffs’ artful inclusion of the
26 term “business opportunity” in their Complaint does not turn it into an unregistered security.
27
28

1 64. Further, the anticipated profits were not to come solely from the efforts of others. Plaintiffs
2 had to have an active role in operating and maintaining their Amazon storefronts, namely they had
3 to: (1) “ maintain a legal U.S. business entity in good standing ... [(2)] establish an Amazon seller
4 account owned by the Client's business ... [(3)] obtain[ing] the necessary business licenses [and]
5 state sales tax exemption certificates, [(4)] pay[ing] any legally required taxes, [(5)] fil[ing] any
6 lawfully required tax returns ... [and (6)] pay Amazon seller account fees directly to Amazon to
7 maintain an active Amazon retail store, plus any webhosting fees.” See Ex. A to Dkt. 1 at pp. 1-2.
8 While Plaintiffs’ make unsubstantiated allegations that other Wealth Assistant’s clients had their
9 Amazon storefronts suspended or terminated, Plaintiffs do not allege that this happened to any of
10 them. Further, if other Amazon storefronts were suspended or terminated it was likely due to the
11 client’s failure to maintain the legal operation of their storefront as outlined in the contract above.
12

13 *Id.*

14
15 65. The contracts also state that “[t]he final approval for the design, them, and niche for the
16 Client’s Amazon market place will be [made by] the Client ... the Service Provider will not be
17 responsible or liable for any such selections made..” *Id.* at p. 2. A client’s individual success
18 depended in large part upon the client’s selection of a nice market and the type of inventory they
19 would sell. The contract further warned that “[t]he Service Provider is not liable for any specific
20 outcomes and makes no claims about the amount of success the Client will achieve. Results may
21 vary depending on many factors, such as market trends, conditions and third-party algorithms
22 over which the Service Provider has not influence.” *Id.* The contract also specifically stated that
23 “the ability of the Service Provider to complete its responsibilities under the Agreement may be
24 contingent on the Client’s responsibilities. Accordingly, Service Provider is not responsible for
25 any costs, charges, or losses incurred by the Client due to the Client’s failures to meet its duties
26 under this Agreement.” *Id.* Therefore, Plaintiffs attempt to couch their service contracts as passive
27
28

1 investment opportunities is disingenuous at best. If Plaintiffs failed to read their written contracts
2 and understand their responsibilities thereunder, that blame rests with Plaintiffs, not Defendants.

3 66. Accordingly, this Court must dismiss Plaintiffs' cause of action for violation of securities
4 laws.

5 6 **III. CONCLUSION**

7 67. Based on the foregoing and for good cause shown, Defendants respectfully requests that
8 this Court grant Defendants' Rule 12(b)(2) and Rule 12(b)(6) Motion to Dismiss and for such
9 other and further relief to which the Defendants may show themselves to be justly entitled.

10
11 Dated: April 30, 2024.

Respectfully submitted,

12 By: /s/ Rachel M. Crockett

13 Rachel M. Crockett

14 15 **CERTIFICATE OF COMPLIANCE**

16 The undersigned, counsel of record for Defendants, certifies that this Motion contains
17 6,332 words, which complies with the word limit of L.R. 11-6.1

18 /s/ Rachel M. Crockett

19 Rachel Crockett

20 21 **CERTIFICATE OF SERVICE**

22 I hereby certify that a true and correct copy of the foregoing document, and any
23 attachments, will be served to counsel of record, in accordance with the governing rules of
24 procedure regarding service in this court on this **April 30, 2024**, via email as follows:

25 /s/ Rachel Crockett

26 Rachel Crockett